No. 89-86

Supreme Court, U.S.
FILED
JUL 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

JACK E. FLEMING,
CAROLYN D. FLEMING,

Petitioners

vs.

WILLIAM E. RHODES,
D. RICHARD TOTH,
WILLIAM A. HUSTON,
DONALD E. WOODHOUSE,
LAW FIRM OF HUSTON & WOODHOUSE, P. C.,
DENVER NATIONAL BANK,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Submitted by:

Jack E. Fleming,
Carolyn D. Fleming,
3624 Citadel Drive North,
Suite 250
Colo. Spgs., Colo. 80909
(719) 598-5286

Petitioners are Pro Se.

QUESTIONS PRESENTED FOR REVIEW

1. Whether any of the Petitioners' seven (7) claims for relief as stated in the complaint alleging violation and/or deprivation of certain federal constitutional rights and so noted by the U. S. Court of Appeals in its order and judgment (Appendix B) states a cause of action pursuant to Title 42 USC sec. 1983.

2. Whether the U. S. Court of Appeals "erred" when affirming the order of the District Court to dismiss this action for the lack of subject matter jurisdiction.

3. Whether the Petitioners, pro se, can legally file lawsuits in the federal court against state court judges, prominent law firms, and prominent attorneys pursuant to Title 42 USC sec. 1983 for alleged violation and/or deprivation of one's federal constitutional rights under the color of state law.

4. Whether the District Court has jurisdiction pursuant to 28 USC 1331 and 28 USC

1343 to review state court orders issued and state court procedures used in a state court action to determine if any of the Petitioners' federal constitutional rights were violated and/or deprived from them during the state court litigation process in Denver National v. Fleming pursuant to Title 42 USC sec. 1983 as so alleged in their complaint.

5. Whether the U. S. Court of Appeals denied the Petitioners' procedural due process of law by not allowing the Petitioners the use of 10th Circuit Court Rule 33.2 Settlement Conferences before briefs were submitted to the court for determination as so stated in Rule 33.2.

6. Whether the U. S. Court of Appeals can legally grant an award of damages and double costs pursuant to FRAP Rule 38 and 28 USC sec. 1912 for the taking of a frivolous appeal without stating any findings of fact and conclusions of law to support their

award when the appeal was legally taken pursuant to FRAP Rule 3(a) and Rule 4(a)(1).

7. Whether the Petitioners, as citizens of the United States all of their lives, are actually covered by the U. S. Constitution and its amendments and are entitled to sue other parties and defend themselves as pro se litigants in any or all of the courts within the United States and its territories.

PARTIES TO PROCEEDINGS BELOW

The only parties to this proceeding in the court below are those indicated by the caption of this case.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

JACK E. FLEMING,
CAROLYN D. FLEMING,

Petitioners,

v.

WILLIAM E. RHODES,
D. RICHARD TOTH,
WILLIAM A. HUSTON,
DONALD E. WOODHOUSE,
LAW FIRM OF HUSTON & WOODHOUSE, P. C.
DENVER NATIONAL BANK,

Respondents

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

The Petitioners, Jack E. Fleming and Carolyn D. Fleming, respectfully pray that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Tenth Circuit.

CITATION OF OPINIONS OF COURTS BELOW

Opinions of lower courts cited below:

Jack E. Fleming and Carolyn D. Fleming v. William E. Rhodes, et al., Case No. 88-C-487. (Appendix A)

Jack E. Fleming and Carolyn D. Fleming v. William E. Rhodes, et al., Case No. 88-1913. (Appendix B)

Jack E. Fleming and Carolyn D. Fleming v. William E. Rhodes, et al., Case No. 88-1913. (Appendix C)

JURISDICTION

1. The jurisdiction of the U. S. District Court was invoked pursuant to 28 USC 1331 and 28 USC 1343. The order dismissing the Petitioners' action is dated May 10, 1988.

2. The date of the opinion and order of the United States Court of Appeals for the Tenth Circuit stating that the federal courts do not have jurisdiction to review state court judgments is dated March 7, 1989. The order denying Petitioners' request for a rehearing and suggestion for rehearing en banc was entered by the Court of Appeals on April 17, 1989.

3. The jurisdiction of this Court is invoked pursuant to 28 USC 1254.

STATEMENT OF THE CASE

On March 30, 1988, the Petitioners filed this action in the U. S. District Court for the District of Colorado pursuant to Title 42 USC sec. 1983, and the District Court had jurisdiction in the case pursuant to 28 USC 1331 and 28 USC 1343. The Petitioners alleged that their civil rights had been deliberately violated during the litigation process in the state court action known as Denver National v. Fleming. As alleged in the Petitioners' complaint, they had been denied due process of law, equal protection under the law, access to the courts and other civil rights when Judge Rhodes awarded the Plaintiff in Denver National v. Fleming judgment in the amount of $46,221.68 without the Petitioners as defendants in that case being allowed to argue their defense in open court at a trial of the issues. The Petitioners were flatly denied all rights associated with due process of law and access to the courts. How

the Petitioners could have had a money judgment entered against them without the benefit of trial is beyond all comprehension. This just cannot be done pursuant to proper judicial procedure.

The Petitioners supplied the District Court with all of the documentation (exhibits) needed to show and prove that they had indeed been denied and deprived of their federal constitutional rights as alleged in their complaint. The only court in the United States to have jurisdiction over the deprivation of federal constitutional rights is the U. S. District Court pursuant to Title 42 USC sec. 1983. The state trial courts and the state appellate courts do not have jurisdiction over federal constitutional rights pursuant to 42 USC 1983. The Petitioners also alleged that Respondent Judge Toth violated the Petitioners' federal constitutional rights when he refused to rule on the Petitioners' Rule 60(b)(3) motion pursuant to the Colo-

rado Rules of Civil Procedure. The Petitioners asked Judge Toth to rule on the validity of Judge Rhodes's judgment, but he refused to do so. Judge Toth had jurisdictional powers pursuant to CRCP Rule 60(b)(3) to make such a ruling. The District Court order (Appendix A) is in complete error. The 10th Circuit decision in Anderson v. Colorado 793 F2d 262 (1986) does not apply in this case, and the District Court knew or should have known that at the time of its ruling. Besides, this Court never ruled on the constitutionality or content of Anderson v. Colorado, supra, because the case never came that far. The U. S. District Court, the U. S. Court of Appeals and this Court have the duty and jurisdiction to examine the quality, extensiveness and fairness of procedures used in prior litigation in state court and the redetermination of the issues in federal court is warranted if such doubt exists.

The Petitioners alleged in their complaint to the District Court their doubt as to the quality, extensiveness and fairness of procedures followed in Denver National v. Fleming, but the District Court and the U. S. Court of Appeals absolutely refused to redetermine the issues as mandated in Morgan v. City of Rawlins 792 F2d 975 (10th Cir. 1986) and State of Montana v. United States 440 US 147, 59 L Ed 2d 210, 99 S. Ct. 970 (1979). In England v. Louisiana State Board 375 US 411, 11 L Ed 2d 440, 84 S. Ct. 461 (1964), this Court ruled as follows:

> When a federal court is properly appealed to in a case over which it has jurisdiction, it is its duty to take such jurisdiction.
>
> The right of a party plaintiff to choose a federal court where there is a choice cannot be properly denied.
>
> In cases where, but for the application of the abstention doctrine, the primary fact determination would have been made by the Federal District Court, a litigant may not be unwillingly deprived of that determination; the pos-

> sibility of appellate review by the Supreme Court of a state court determination may not be substituted against a party's wishes, for his right to litigate his federal claims in the federal courts.

The Petitioners had a perfect right to come to the District Court and file suit for the deprivation of their civil rights whether or not they file any appeals with the state appellate courts. That is the only reason that Congress enacted 42 USC 1983.

In State of Montana v. United States, supra, this Court ruled as follows regarding the abstention doctrine and the policy of redetermining the issues:

> The abstention doctrine may not be used as a vehicle for depriving individuals of an otherwise cognizable right to have federal courts make factual determinations essential to the resolution of federal questions.
>
> The redetermination of issues is warranted if there is reason to doubt quality, extensiveness, or fairness of procedures followed in prior litigation.

The District Court and the U. S. Court of Appeals were under direct orders from this

Court to not apply the abstention doctrine when a federal question was at hand, and that these same courts were to redetermine the issues when there was doubt regarding fairness of procedures used in the prior litigation. The Petitioners feel that they have not yet been afforded the benefits of this Court's rulings regarding those subjects.

In Garcia v. Wilson 731 F2d 640 (10th Cir. 1984), the U. S. Court of Appeals ruled regarding claims brought to the federal court pursuant to 42 USC 1983. The The Petitioners feel that they proved to both the District Court and the U. S. Court of Appeals that their federal constitutional rights had been denied them under the color of state law. All of those facts were stated clearly and established with exhibits in the Petitioners' complaint as filed in the District Court. In Monroe v. Pape 365 US 167, 5 L Ed 2d-492, 81 S. Ct. 473

(1961), this Court ruled regarding the federal statute known as 42 USC 1983. In that decision, this Court made it very clear what the intent and use of the statute 42 USC 1983 was to be involving the alleged deprivation of one's federal constitutional rights. The Petitioners also feel that their claims for relief stated several causes of action pursuant to 42 USC 1983 and did so beyond any doubt.

In Verner v. State of Colorado 533 F. Supp. 1109 (D. Colo. 1982), affirmed 10th Cir. (1983), 716 F2d 1352, cert. denied 466 US 960, the court stated that state officials may be sued in their personal capacity for damages in a federal action because the Eleventh Amendment grants them no immunity even when they are acting in their official capacity. In Pulliam v. Allen 466 US 522, 80 L Ed 2d 565, 104 S. Ct. 1970 (1984), this Court ruled that Congress intended 42 USC 1983 to be an in-

dependent protection for federal rights and nothing suggested that Congress intended to expand the common-law doctrine of judicial immunity to insulate state judges completely from collateral review.

Respondent Judge Rhodes granted summary judgment to the Plaintiff in Denver National v. Fleming as to the issue of liability, and then granted a money judgment in the amount of $46,221.68 without a trial as to the issue of damages in open court. That whole procedure was completely contrary to CRCP Rule 56(c), Volume 7A of the CRS 1973 which states as follows:

> A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

The issue as to the amount of damages should have been tried by the trier of the fact in open court. The Petitioners pointed this out to Judge Rhodes on several occasions, but he chose to ignore the same.

The Petitioners also feel that they were severely discriminated against when they were denied by the U. S. Court of Appeals the priviledges stated in Rules of Court for the 10th Circuit, Rule 33.2 Settlement Conferences. The rule reads as follows:

> Settlement conferences shall be conducted in all civil proceedings which do not seek relief from criminal conviction. Within 10 days after notice that the matter has been set for oral argument, or after notice that the court intends to submit the matter on the briefs, counsel for the appellant/petitioner shall initiate a conference with counsel for the appellee/respondent regarding prospective settlement of the issues of appeal.

The Petitioners were never given the opportunity to try and settle the issues on appeal with the Respondents. The U. S. Court of Appeals issued its ruling on March 7, 1989 before any notice to attempt to settle was given to the Petitioners. Secondly, the opinions in this case, 88-1911, 88-1918 and 88-1922 were all treated the same. These opinions were all written by

the same three (3) circuit judges, all written within a three (3) day period, and all four (4) opinions read almost word for word throughout the opinion. The Petitioners feel that they have been severely discriminated against because they feel that they are entitled to have these cases ruled on by more than the same three (3) judges. Petitioners feel that the U. S. Court of Appeals committed severe judicial discrimination against the Petitioners because the court should have given at least two (2) cases to other judges to see if the opinions of those judges would have been the same.

The Petitioners' appeal in this case was filed in <u>good faith</u> and as a <u>matter of law</u> pursuant to FRAP Rule 3(a) and Rule 4(a)(1). The Petitioners filed this appeal and proceeded with their appeal because they felt that the District Court had "erred" when it dismissed the Petitioners' sec. 1983 action for the reasons stated

in the District Court's order. The Petitioners felt that their appeal was the only and correct way to correct the errors made by the District Court. The Petitioners do not believe that their appeal in this case was legally frivolous. This Court must not allow the precedence to be set that pro se litigants cannot appeal their cases to the 10th Circuit without the fear of being assessed damages and double costs because they exercised their constitutional right of appeal, which is a form of the right of access to the courts.

REASONS FOR GRANTING THE PETITION

1. All seven (7) of the Petitioners' claims for relief stated causes of action in this case pursuant to Title 42 USC 1983. Petitioners were denied access to the courts by both the District Court and the U. S. Court of Appeals.

2. It has been established by this Court that Title 42 USC 1983 can be used to leg-

ally file suit against state court judges and other prominent judicial people including attorneys who are alleged to have violated one's federal constitutional rights.

3. The U. S. Court of Appeals "erred" when it affirmed the order of the District Court. The U. S. District Court did have the proper jurisdiction to hear Petitioners' claims for relief pursuant to 28 USC 1331 and 28 USC 1343.

4. This Court must allow certiorari in this case because the Petitioners' rights were violated by the Respondents in this action along with the District Court and the U. S. Court of Appeals.

5. The U. S. Court of Appeals denied the Petitioners their procedural due process rights by not allowing the Petitioners the use of 10th Circuit Court Rule 33.2, namely, Settlement Conferences before briefs were submitted to the court for determination.

6. The appeal to the U. S. Court of Appeals was not legally frivolous. The Petitioners

appeal was filed in good faith and as a matter of law pursuant to FRAP Rule 3(a) and Rule 4(a)(1). The U. S. Court of Appeals failed to state findings of fact and conclusions of law to support its ruling that the appeal was legally frivolous. The Respondents in this case are not entitled to damages and double costs as so awarded by the U. S. Court of Appeals.

7. To deny this petition for certiorari would mean that both of the Petitioners are not covered by the U. S. Constitution. The District Court, the U. S. Court of Appeals and the Respondents have all deprived the Petitioners of certain of their federal constitutional rights during the litigation process. This Court must restore those rights. It cannot be allowed to be established that the federal courts can permanently deprive one of his federal constitutional rights. This will set a precedence that only a few within the United States would really want to be set. A person

must be allowed to go to court pro se, and during the litigation process that follows, that person cannot be deprived of one or more of their federal constitutional rights by the federal courts or any other court within the United States and its territories. That must be an absolute mandate proclaimed by this Court in this case. This mandate must become the law of the land.

CONCLUSION

The only real question in this petition for this Court to determine is whether the Petitioners are covered by all of the individual rights, liberties and priviledges as stated in the U. S. Constitution and its amendments, namely, the First Amendment, the Fifth Amendment and the Fourteenth Amendment. Both of the Petitioners were born citizens of the United States of America and have lived in this country all of their lives. It appears to the Petitioners that so far all of the lower courts, both state and federal, believe that the Pet-

itioners are not covered by the U. S. Constitution. If the Petitioners, as citizens of the United States of America, are indeed covered by all of the rights, priviledges and liberties as so stated in the U. S. Constitution, then this Court must grant certiorari in this case. A denial of this petition in this case would affirm the District Court order, affirm the order and judgment of the U. S. Court of Appeals, and affirm all state court orders and procedures that violated the Petitioners' federal constitutional rights, and establish once and for all, that the Petitioners are just not covered by the U. S. Constitution.

This Court must now come into this case and accept jurisdiction as should have been done by the District Court and the U. S. Court of Appeals as so stated by this Court in England v. Louisiana State Board, supra. This Court must then wipe away the stigma of the abstention doctrine left by District Court and the Court of Appeals

and redetermine all of the issues in this case as mandated by its own opinion in State of Montana v. United States, supra. This Court must do this because all other lower courts have refused to do so. This Court must now determine if the Petitioners' federal constitutional rights were ever violated, and if so, must reinstate those rights and remand this case back to the District Court for a trial for damages pursuant to Title 42 USC sec. 1983.

The Petitioners respectfully request that this Court grant certiorari in this case and that this Court decide once and for all whether the Petitioners, as citizens of the United States, are truly covered by the U. S. Constitution and all of its respective amendments as citizens and also as pro se litigants.

Respectfully submitted,

Jack E. Fleming, Petitioner
3624 Citadel Dr. No. # 250
Colo. Spgs., Colo. 80909
(719) 598-5286

Carolyn D. Fleming, Petitioner
3624 Citadel Drive No. # 250
Colo. Spgs., Colo. 80909
(719) 598-5286

CERTIFICATE OF SERVICE

I hereby certify that I mailed a true and correct copy of the Petitioners' petition for writ of certiorari, postage prepaid, this 10th day of July, 1989 to:

Gregg E. Kay, Esquire
First Assistant Attorney General
1525 Sherman Street, 3rd Floor
Denver, Colorado 80203

William A. Huston, Esquire
HUSTON & WOODHOUSE, P C.
1658 Cole Blvd., Suite 275
Golden, Colorado 80401

Jack E. Tierney

APPENDIX

APPENDIX A

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 88-C-487

JACK E. FLEMING and CAROLYN D. FLEMING,

Plaintiffs,

v.

WILLIAM E. RHODES, et al.,

Defendants.

ORDER

Carrigan, J.

Pro se plaintiffs Jack and Carolyn Fleming commenced this action pursuant to 42 U.S.C. 1983 alleging that the defendants violated their constitutional rights. Defendants are William E. Rhodes, D. Richard Toth, William A. Huston, Donald E. Woodhouse, the law firm Huston & Woodhouse, P.C., and Denver National Bank ("DNB").

Plaintiffs allege that jurisdiction exists under 42 U.S.C. 1983, and the First, Fifth and Fourteenth Amendments to the United States Constitution. These provisions, however, do not authorize federal jurisdiction. Nevertheless, if the plaintiffs have properly alleged a 1983 claim, then jurisdiction would colorably exist under 28 U.S.C. 1331 and 1343.

The complaint alleges the following facts: In October 1984 DNB commenced a lawsuit against the Flemings in the state District Court for El Paso County, Colorado, to recover on a promissory note. Defendant Rhodes was the judge assigned to the case. Defendants Huston and Woodhouse of the defendant law firm Huston and Woodhouse, P.C., represented DNB. Although the Flemings initially were represented by counsel, they dismissed their attorney in January 1986.

In April 1986, Judge Rhodes granted DNB's motion for summary judgment in his chambers

without allowing the Flemings an opportunity to defend the motion in open court. Judge Rhodes then entered judgment in favor of DNB against the Flemings in the amount of $46,221.68. Subsequently, Judge Rhodes retired from the bench and was replaced by Judge Toth who denied the Flemings' motion for relief from judgment.

The first claim for relief alleges that by granting the motion for summary judgment without permitting oral argument in open court, Judge Rhodes denied the Flemings due process of law, in violation of the Fifth and Fourteenth Amendments. The second claim asserts that all of the defendants conspired to violate the Flemings' constitutional rights. The third claim for relief alleges that the defendants conspired to deny the Flemings their First Amendment right of access to the courts. The fourth Claim seeks to hold the defendant Rhodes liable for gross negligence. The fifth claim

asserts that the Flemings were denied equal protection under the law when the defendant Rhodes rules against them. The sixth claim alleges abuse of process against Judge Rhodes. The seventh claim for relief alleges that the defendant Judge Toth violated the Flemings' constitutional rights by denying their motion for relief from judgment.

On April 18, 1988, the defendants Rhodes and Toth filed a motion to dismiss pursuant to Rules 12(b)(1) and 12(b)(6), Fed. R. civ. P. The remaining defendants submitted a motion to dismiss under Rule (12)(b) on April 22, 1988. The parties have briefed the issues and oral argument would not materially assist my decision.

In reviewing the sufficiency of a complaint when tested by a motion to dismiss, I must accept as true the complaint's allegations and view them in a light most favorable to the plaintiff. Scheuer v. Rhodes, 416 U.S. 41, 232, 236 (1974). The complaint must stand unless it

appears beyond doubt that the plaintiffs have alleged no set of facts that would entitle them to relief. Conley v. Gibson, 355 U.S. 41,45-46 (1957).

Defendants Rhodes and Toth contend that the complaint and this action must be dismissed as against them because: (1) the plaintiffs, in effect, are asking this court to review the actions of a state trial court rather than appealing those actions to a state appellate court; (2) the Eleventh Amendment bars the complaint; (3) the complaint fails to state a claim for relief under 1983; (4) the defendant judges were acting in their official capacity and are therefore shielded by judicial immunity; and (5) federal district court review of state court decisions violates the comity doctrine. Alternatively, Rhodes and Toth request that I abstain from reviewing the state court rulings.

In their separately filed motion to dismiss, the defendants Huston, Woodhouse, Huston and Woodhouse, P.C., and DNB argue that the complaint and action should be dismissed for: (1) lack of subject matter jurisdiction; and (2) failure to state a claim under 1983.

Federal district courts have no authority to review a final judgment of a state court in judicial proceedings. D.C. Court of Appeals v. Feldman, 460 U.S. 462 (1983). Where a constitutional issue could have been reviewed on direct appeal by the state appellate courts, a litigant may not seek to reverse or modify a state court judgment by asserting a constitutional claim under 1983. Anderson v. State of Colorado, 793 F2d 262 (10th Cir. 1986).

Anderson involved a civil rights action filed in federal district court alleging that Colorado and certain Colorado district judges had violated the plaintiff's Fourteenth

Amendment rights by engaging in a discriminatory practice of awarding custody to mothers in child custody disputes. The Tenth Circuit affirmed the district court's dismissal of the action for lack of subject matter jurisdiction, reasoning:

> "Despite (the plaintiff's) protestations to the contrary, this lawsuit essentially seeks to undo the custody decision of the Colorado state court. Therefore it fits squarely within the (doctrine) prohibiting federal district courts from reviewing state court judgments. (Plaintiff's) recourse, if any, is to exhaust his appeals in the Colorado courts and to petition the Supreme Court of the United States for certiorari review of the decision of the state supreme court." 793F.2d at 264.

The present action is indistinguishable from Anderson. As in Anderson, the plaintiffs here are seeking review of the final judgments of a

state trial court. Also, as in Anderson, the plaintiffs' recourse here, if any, was to take their appeals to the Colorado appellate courts and, if necessary, to petition the United States Supreme Court for certiorari review of the Colorado Supreme Court's decision. I conclude tnat this action is a transparent attempt to seek appellate review of state court rulings in federal district court, and therefore, this court lacks subject matter jurisdiction over the plaintiffs' claims. Because I have determined that subject matter jurisdiction is lacking in this court, I need not address the defendants' other arguments in favor of dismissal.

Moreover, I find and conclude that this action is frivolous and that the plaintiffs have filed it in violation of Rule 11, Fed. R. Civ. P. and 28 U.S.C. 1927. Therefore the defendants are entitled to an order that the plaintiffs pay for their attorneys' fees and costs in a

reasonable amount. Counsel and the parties shall confer within 11 days in a effort to agree upon a reasonable amount to be paid by the plaintiffs for the defendants' attorneys' fees and costs. Upon agreement, the defendants shall report to the court in writing the fact of agreement and the amount agreed. If all issues cannot be agreed upon, the defendant shall report the status and request an expedited hearing to decide all matters in dispute.

The parties are admonished that additional attorneys' fees and costs may be awarded for bad faith delay or failure to agree to reasonable proposals to finalized this matter.

Accordingly, IT IS ORDERED that:

(1) The motion to dismiss of the defendants William E. Rhodes and D. Richard Toth is granted;

(2) The motion to dismiss of the defendants William A. Huston, Donald E. Woodhouse, Huston and Woodhouse, P.C.; and Denver National Bank, is granted;

(3) The complaint and this action are dismissed with prejudice;

(4) Plaintiffs shall pay the defendants' reasonable attorneys' fees and costs as provided above; and

(5) Defendants shall submit an amended order for judgment to be signed by the judge, and an order for judgment to be signed by the clerk of the court.

Dated at Denver, Colorado, May 10, 1988.

BY THE COURT:

_____

JIM R. CARRIGAN, JUDGE

UNITED STATES DISTRICT COURT

APPENDIX B

APP 11

IN THE
UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
UNITED STATES COURTHOUSE
DENVER, COLORADO 80204

Robert L. Hoecker March 7, 1989 (303)844-3157
Clerk FTS 564-3157

Mr. James R. Manspeaker
Clerk
U.S. District Court for the District of Colorado
C-145 United States Courthouse
Denver, CO 80294

Mr. William A. Huston
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Mr. Gregg E. Kay
Office of the Attorney General
State of Colorado
1525 Sherman Street
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Denver, CO 80203

Mr. Jack E. Fleming
Mrs. Carolyn D. Fleming
3624 Citadel Drive North
Suite 250
Colorado Springs, CO 80909

Re: 88-1913, Fleming v. Rhodes
(Lower docket: 88-C-487,)

Dear Mr. Manspeaker, Mr. and Mrs. Fleming and Counsel:

The court's order and judgment was filed in the subject case today. A copy of the order and judgment is enclosed for all parties.

In accordance with Fed. R. App. P. 41, I enclose for the clerk of the trial court, or for the named agency, a certified copy of the order and judgment, which constitutes the mandate. By direction of the court, the mandate shall be filed immediately in the records of the trial court or agency. I also enclose for the clerk of the trial court, or for the named agency, a mandate receipt. Please sign this receipt and

return it to this office. Please call this office if you have questions.

Very truly yours,

ROBERT L. HOECKER, Clerk

RLH:kmh

enclosure

cc: Honorable Jim R. Carrigan, District Judge.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JACK E. FLEMING, CAROLYN D. FLEMING, Plaintiffs-Appellants,	)
v.	)No. 88-1913)D.C. No. 88-C-487)) (D. Colo.)
WILLIAM RHODES; D. RICHARD TOTH; WILLIAM HUSTON; DONALD WOODHOUSE; LAW FIRM OF HUSTON & WOODHOUSE; DENVER NATIONAL BANK, Defendants-Appellees.	)

APP 14

ORDER AND JUDGMENT*

Before ANDERSON and TACHA, Circuit Judges, and ROGERS, District Judge.**

**The Honorable Richard D. Rogers, United States District Judge for the District of Kansas, sitting by designation.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The cause therefore ordered submitted without oral argument.

Plaintiffs commenced this action pursuant to 42 U.S.C. 1983, alleging defendants violated plaintiffs' constitutional rights during the

course of a state court proceeding. Defendant Denver National Bank, represented by defendants Huston and Woodhouse, commenced an action in Colorado state court alleging plaintiffs defaulted on a promissory note owned by the bank. Defendants Rhodes and Toth were the state court judges presiding over this proceeding. The state court granted summary judgment in favor of Denver National Bank.

In their federal complaint, plaintiffs asserted seven 1983 claims for relief arising from the state court proceeding: 1) defendants denied plaintiffs due process by granting Denver National Bank summary judgment without providing plaintiffs an opportunity for oral argument; 2) defendants conspired to deny plaintiffs due process by denying plaintiffs an opportunity to proceed to trial; 3) defendants conspired to deny plaintiffs access to the courts by granting

summary judgment in favor of Denver National Bank and vacating a previously set trial date; 4) defendant Rhodes was grossly negligent in granting summary judgment; 5) defendant Rhodes denied plaintiffs equal protection of the laws by granting summary judgment; 6) defendant Rhodes abused judicial process by granting summary judgment; and 7) defendant Toth violated plaintiffs' constitutional rights by denying plaintiffs' motion for relief from judgment made pursuant to Colo. R.Civ. P. 60(b)(3). As relief, plaintiffs sought declaratory and injunctive relief and damages.

The district court dismissed plaintiffs' 1983 claims pursuant to Fed. R. Civ. P. 12(b) for lack of subject matter jurisdiction and awarded defendants attorney's fees. Plaintiffs filed a motion for reconsideration, which the

district court denied. Plaintiffs appeal the dismissal of their 1983 claims and the district court's award of attorney's fees.

A federal district court does not have authority to review a state court judgment where, as in this action, the relief sought is in the nature of appellate review. Anderson v. Colorado, 793 F.2d 262, 263 (10th Cir. 1986), Van Sickle v. Holloway, 791 F.2d 1431, 1437 (10th Cir. 1986); see District of Columbia court of Appeals v. Feldman, 460 U.S. 462, 482 (1983). The district court order dismissing plaintiffs' claims is affirmed.

On appeal, plaintiffs also argue the district court erred in awarding defendants attorney's fees pursuant to Fed. R. Civ. P. 11 and 28 U.S.C. 1927. This court will not reverse a district court's imposition of sanctions unless it appears the district court abused its

discretion. Adamson v. Bowen, 855 F.2d 668, 672-73)10th Cir. 1988); Autorama Corp. v. Steward, 802 F.2d 1284, 1288 (10th Cir. 1986). Review of the district court record indicates the district court did not abuse its discretion in imposing sanctions against plaintiffs for filing a frivolous action.

Defendants also moved for sanctions on appeal. Plaintiffs have had an opportunity to respond to this request.

> Courts have the inherent power to impose a variety of sanctions ... litigants ... in order to regulate their docket, promote judicial efficiency, and deter frivolous filings. See, e.g., Roadway Express, Inc. v. Piper, 447 U.S. 752, 764-67 ... (1980); Link v. Wabash R. Co., 370 U.S. 636, 632 ...(1962); Whitney v. Cook, 99 U.S. (9 Otto) 607...(1878). In addition, Fed. R. App. P.

38 and 28 U.S.C. 1912 provide that a court of appeals may award just damages and single or double costs if the court "determine(s) that an appeal is frivolous" or brought for purposes of delay. This court has imposed attorney's fees and double costs for the taking of frivolous appeals in other contexts. See, e.g., United States v. Rayco, Inc., 616 F.2d 462, 262 (10th Cir. 1980).

Stafford v. Commissioner, 805 F.2d 895, 896 (10th Cir. 1986);

Stafford v. Commissioner, 805 F.2d 893,894-95 (10th Cir. 1986). In light of plaintiffs' legally frivolous appeal, an award of damages and double costs is justified.

The judgment of the United States District Court for the District of Colorado is AFFIRMED and the case is REMANDED to the district court

to determine the amount of sanctions to be awarded for taking a legally frivolous appeal. The district court may look to the principles that have evolved in the interpretation of Rule 11 in assessing the amount of the sanction awarded pursuant to Rule 38 and 1912. See Atkinson v. O'Neill, ___ F.2d ___, No. 88-132m slip. op. at 4-5 (10th Cir. filed Feb. 10, 1989); Mullen v. Household Bank-Federal Sav. Bank, ___ F.2d ___, No. 87-1335, slip. op. at 5 (10th Cir. Filed Feb 10, 1989).

The mandate shall issue forthwith.

ENTERED FOR THE COURT

PER CURRIAM

APPENDIX C

APP 21

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
UNITED STATES COURTHOUSE
DENVER, COLORADO 80294

Robert L. Hoecker
Clerk

(303)844-3157
FTS564-3157

April 17, 1989

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Colorado Springs, CO 80909

Re: 88-1913, Fleming v. Rhodes
(Lower docket: 88-C-487,)

Dear Counsel, Mr. & Ms. Fleming:

Enclosed is a copy of an order entered today in the captioned case.

Please call this office if your have questions.

Sincerely,

ROBERT L. HOECKER

Clerk

RLH:kas

Enclosure

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JACK E. FLEMING; CAROLYN D. FLEMING Plaintiffs-Appellants, v. WILLIAM RHODES; D. RICHARD TOTH; WILLIAM HUSTON; DONALD WOODHOUSE; LAW FIRM OF HUSTON & WOODHOUSE; DENVER NATIONAL BANK, Defendants-Appellees.	)	No. 88-1913

ORDER

Before HOLLOWAY, Chief Judge, MCKAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, Circuit Judges, and ROGERS, District Judge.*

*The Honorable Richard D. Rogers, United States District Judge for the District of Kansas, sitting by designation.

This matter is before the court of appellant's petition for rehearing with suggestion for rehearing en banc.

The materials submitted by appellant have been reviewed by the members of the hearing panel, who conclude that the original disposition was correct. Accordingly, the petition is denied on the merits.

The petition having been denied on the merits by the panel to whom the case was submitted, the petition for rehearing with

suggestion for rehearing en banc was transmitted to all the judges of the court in regular active service in accordance with Rule 35(b) of the Federal Rules of Appellate Procedure. No member of the nearing panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court

_____

ROBERT L. HOECKER, Clerk